Masiongale Electrical-Mechanical, Inc. ***and*** **Indiana State Pipe Trade Association and United Association Local 172, a/w United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO** ***and*** **Indiana State Pipe Trades Association and United Association Local 661, a/w United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL–CIO.** Cases 25–CA–25119, 25–CA–25246, 25–CA–25446, and 25–CA–25731

June 30, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On January 15, 1999, Administrative Law Judge Bruce D. Rosenstein issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this matter to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, except as set forth below, and to adopt the recommended Order, as modified.

The Respondent excepts to the judge's conclusion that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to employ or consider for hire 20 union plumber applicants. On May 11, 2000, the Board issued its decision in *FES (A Division of Thermo Power),* 331 NLRB No. 20, setting forth the framework for analysis of refusal-to-hire and refusal-to-consider violations. The Board has decided to remand this issue to the judge for further consideration in light of *FES*, including, if necessary, reopening the record to obtain evidence required to decide the case under the *FES* framework.

The Respondent also excepts to the judge's conclusion that it violated the Act in other respects. None of the remaining issues implicates our recent decision in *FES* and there is no reason to delay the resolution of those issues pending the outcome of the limited remand we are ordering. Accordingly, having considered the Respondent's remaining exceptions and found them without merit, we have decided to issue a final Order with respect to the remaining violation found by the judge.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Masiongale Electric-Mechanical Inc., Muncie, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following after paragraph 1(f) and reletter the last paragraph accordingly.

"Discharging employees because of their union activities."

2. Delete paragraphs 2(d) through (e) and reletter the subsequent paragraphs.

3. Substitute the attached notice for that of the administrative law judge.

IT IS FURTHER ORDERED that the issue of whether the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire and/or consider union applicants is severed from the rest of this proceeding and remanded to the administrative law judge for appropriate action as noted above.

IT IS FURTHER ORDERED that the administrative law judge shall prepare a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order, as appropriate on remand. Copies of the supplemental decision shall be served on all parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT interrogate employees concerning their union membership, sympathy, and activity.

WE WILL NOT threaten our employees with violence because they engaged in union activity.

WE WILL NOT engage in surveillance of our employees engaged in union activities.

WE WILL NOT isolate or restrict the work activities of certain of our employees because they engaged in union activities.

WE WILL NOT change our hiring policies by requiring applicants to be interviewed by a private investigator for the purpose of discouraging union applicants.

WE WILL NOT tell our employees that they are prohibited from discussing the Union or distributing union literature.

WE WILL NOT discharge employees because of their union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Jeffrey Jehl and Anthony Bane full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Jeffrey Jehl and Anthony Bane whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL, on an unconditional offer to return to work by Jack Neil Jr., reinstate him to his former position of employment, displacing if necessary, any replacement hired since May 27, 1997.

MASIONGALE ELECTRIC-MECHANICAL, INC.

Steve Robles, Esq., for the General Counsel.
S. Douglas Trolson and *Malcom M. Metzler, Esqs.,* for the Respondent-Employer.
Anthony W. Bane, Jeffrey E. Jehl, and *Jack Neal Jr.*, for the Charging Party.

DECISION

STATEMENT OF THE CASE

BRUCE D. ROSENSTEIN, Administrative Law Judge. This case was tried before me in Muncie, Indiana, on August 24, 25, and 26, 1998, pursuant to a consolidated complaint and notice of hearing (the complaint) issued by the Regional Director for Region 25 of the National Labor Relations Board (the Board) on January 30, 1998. The complaint, based on a charge filed on December 23, 1996, in Case 25–CA–25119, and a charge filed on March 17, 1997,[1] in Case 25–CA–25246, by the Indiana State Pipe Trades Association and United Association Local 172, a/w United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO (Local 172 or Union), and an original charge filed on June 18, in Case 25–CA–25446 and amended on January 28, 1998, by the Indiana State Pipe Trades Association and United Association Local 661 a/w United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO (Local 661 or Union), and a charge in Case 25–CA–25731 filed on November 7, by Local 661, alleges that Maisongale Electrical-Mechanical Inc. (Respondent or Employer), has engaged in certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Respondent, in its answer to the complaint, denies that it has violated the Act as alleged.

Issues

The complaint alleges that the Respondent discharged three employees, refused to hire or consider for hire 20 applicants for employment, refused to rehire an employee who made an unconditional offer to return to work, and engaged in numerous independent violations of Section 8(a)(1) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation that performs electrical, HVAC,[2] and plumbing services in the construction industry, with an office and place of business in Muncie, Indiana, where it annually purchased and received goods and materials at its facility in excess of $50,000 directly from points outside the State of Indiana. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Local 172 and 661 are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

The Respondent is a nonunion electrical and plumbing contractor, which has operated in the Greater Muncie area for approximately 11 years. It is principally owned and run by Ken Masiongale, the Respondent's president. The office staff is comprised of four clericals including Karen Nottingham, who is responsible for job applications and scheduling interviews for employment. Superintendent John Blevins coordinates work responsibilities from the office while Ron Curd and Michael Woods serve as job superintendents in the field. Mike Masiongale, the owner's son, also serves as a supervisor for the Employer.

Commencing in December 1996 and continuing on a regular basis through September 1997, the Respondent placed advertisements in a number of local newspapers seeking to hire journeymen plumbers to man its jobsites including the Springlake Apartment project in Mishawaka, Indiana, and the Bayshore jobsite in Greenwood, Indiana. Most of the ads required an applicant to apply in person but some listed a toll-free telephone number for inquiries.

1. The overt union member applicants

The above ads prompted a great deal of interest and the business agents for Locals 172 and 661, suggested that unemployed union plumbers submit applications to Respondent. A number of union members individually contacted the Respondent and obtained blank job applications. These applications were given to the respective business agents and were reproduced for distribution to interested members. In conjunction with the first three union members who applied and did not conceal their union affiliation, the Union engaged in informational picketing at the Springlake Apartment project around December 16,1996. The picket signs apprised the public that the Respondent did not pay prevailing or area standard wages. Christine Britton wore a union jacket when she applied at the Springlake Apartment project in mid-December 1996. She showed her plumber license to the job superintendent and they discussed prior job experience. Britton submitted her application to the superintendent, who she later learned was named "Ron," with the statement "Voluntary Union Organizer" across the top. Geoff Paluzzi obtained a copy of Respondent's job application from the business agent of Local 172 and went to the Springlake Apartment project on December 16,1996, to submit it. He

[1] All dates are in 1997 unless otherwise indicated.

[2] HVAC work is the installation of heating and air-conditioning systems, including furnaces, air conditioning compressors, and the related ductwork.

introduced himself to the job superintendent, who reviewed his application and commented that he had a good amount of experience in the plumbing trade and his prior work showed stability. Paluzzi apprised the superintendent that he previously was a foreman, a steward, and a voluntary union organizer. Indeed, like Britton, Paluzzi included the phrase "Voluntary Union Organizer" on the top of his application. The superintendent told Paluzzi that he would hear something in a couple of days. William Rogers filled out a job application at the union hall and included the phrase "Voluntary Union Organizer" across the top. He took the completed application to the Springlake Apartment project on December 16, 1996, and observed a number of pickets patrolling in front of the complex. He introduced himself to the job superintendent while wearing a union jacket with insignia. The superintendent briefly looked over the application, said that the Respondent needed plumbers and after Rogers showed him his plumber license, informed Rogers he would get back to him.

None of these individuals were ever contacted by the Springlake Apartment superintendent or any one else at the Respondent.

Since February 26, 13 unemployed union members with valid plumber licenses submitted job applications to Respondent.[3] Each of the applications included the phrase "Voluntary Union Organizer" across the top. Although the Bayshore jobsite was operational from January 1997 to July 1998, the Respondent did not hire any of the 13 union members that applied for plumber positions.

On August 22, union organizer Anthony Bane met with unemployed plumbers Denny Smith, William Fortwengler, James Salmon, and Stacey Stockton[4] at the Pizza Hut restaurant to brief them on how to apply to nonunion employers. Bane distributed union T-shirts and hats to the employees and suggested that they insert on the top of any application submitted "Voluntary Union Organizer." The group proceeded to the Respondent's facility and requested job applications from the receptionist. Each of the employees wore the union T-shirt and inserted the phrase "Voluntary Union Organizer" on the top of their applications. While the employees were filling out their job applications, Bane asked the receptionist for a list of the Respondent's plumbers and their license numbers. The receptionist left the office area and returned with Superintendent Blevins who apprised Bane that he did not need to show him such a list. Bane replied that there is a law to this effect. While this conversation was taking place, Office Manager Karen Nottingham came in the front door and asked Bane why he was at the office. Bane said, "that the employees were filling out job applications." He also asked Nottingham for a list of Respondent's plumber license numbers. Nottingham said, "Oh, I know you" and said she was unaware of any law requiring that a list be provided. The employees submitted their applications to the receptionist and each received a Xerox copy for their records. None of these employees was ever called or hired by Respondent for a plumber position.

2. The hiring of covert union members Gary Gravit and Jeffrey Jehl

In December 1996, Gary Gravit became aware of job opportunities at the Respondent's Springlake Apartment project, and went to the jobsite to apply for a plumber position. He introduced himself to Superintendent Ron Curd and discussed his qualifications. Curd gave Gravit a job application that he took to the union hall and made copies. Curd telephoned Gravit to offer him a position and inquired if he knew any additional plumbers. It was agreed that Gravit would start work on December 16, 1996, at the Springlake Apartment project.

Gravit met union organizer Jeffrey Jehl on December 16, 1996, around 6 a.m. at a local gas station, and Jehl apprised Gravit about the duties of a voluntary union organizer. He stressed that Gravit should do excellent work but that he should try and talk to employees about the Union before and after work and while on break.

Gravit and Jehl crossed the Union informational picket line when they reported to the jobsite the morning of December 16, 1996. Gravit introduced Jehl to Curd and informed him that Jehl did not have a plumber license but that he was an experienced plumber and could do a good job. Curd said, "if you know how to do plumbing work, it will be fine." Gravit handed his job application to Curd while Jehl filled out his application. Neither employee revealed their union affiliation or put anything in the job application to identify them as union members. At no time did Curd inform the employees about any requirement for a background investigation. Curd asked Jehl about his previous wage history and stated he could pay $13 per hour. Jehl accepted the offer and was hired on the spot.

3. The events that occurred before Gravit and Jehl revealed their union affiliation

Gravit was assigned to do journeyman plumbing work while Jehl worked as a plumber helper backfilling excavation where piping had already been installed. Around 9:30 a.m., Gravit and Jehl observed two individuals with union insignia hand papers to Curd while they briefly conversed. A short time later, Curd approached Gravit and Jehl, and asked whether either of them knew the union men who were just here. Gravit said, "he knew one of the employees." Curd briefly walked away but then returned and said, "have either of you been a member of the union before?" Gravit said, "he worked permit a couple of times in the past few years." Jehl said, "he was never a member of Local 172." Both employees finished work that day without further incident.

4. The events that occurred after Gravit and Jehl revealed their union affiliation

The next day Gravit and Jehl arrived at work around 6:40 a.m., and immediately began distributing union literature and meeting with employees about the Union. Jehl wore a white union organizer jacket while Gravit wore a Local 172, baseball cap. Curd arrived about 10 minutes later, and Jehl apprised him that he was a union organizer. Curd replied, "that he figured yesterday that they were union members since he only gave an application to Gravit that was allowed off site and the two union guys had job applications." He also said, "If Masiongale had to pay union wages they might as well pull off the job, they would go broke and might as well close up."

Gravit and Jehl proceeded to their work area and began backfilling some underground for the installation of pipe. While they were working, Gravit told Jehl that Respondent was in violation of the plumbing code because the pipe was being improperly installed. Jehl did not inform Curd or anyone else at Respondent about the perceived code violations. Rather, he sent a letter to the plumbing inspector about the problem. Around 8 a.m., Gravit and Jehl went to see Curd and told him that they were underpaid because other plumbers on the jobsite were being paid hourly wages in excess of their wage rate. Curd informed both employees that he only had

[3] The 13 employees are Rodney Boyle, Mark Darnell, Charles Atkinson, Jeryl Cooke, Edward Meinzen, Merlin Rice, Charles Gates, Joseph Beatson, James Poulson, Roger Hodson, Bruce Morehouse, Duane Harty, and Michael Bowen.

[4] Stockton filed an earlier application with Respondent on May 23, and noted this on his August 22 job application.

the authority to set starting wages, but could not grant wage increases, and when he was ready he would contact the office to see if they could be paid at a higher rate. Jehl said, "well, until then I am going on strike for better wages." Curd said, "are you both union members?" They said, "yes." He then said, "are you both going out on strike?" Gravit replied, "yes." Both Gravit and Jehl left the jobsite and did not return to work.

On December 23, 1996, after both employees had been on strike for 6 days, the wording on the picket signs changed from an informational picket to a "ULP" picket sign. On that date, Jehl and Assistant Business Agent Jim Sheetz went to the jobsite at Curd's request. They met with Curd along with Superintendent Blevins. A conversation took place concerning why the language of the picket signs were changed and how long the picket signs would remain in front of the jobsite. In January 1997, Jehl had dinner with Curd and two other employees to apprise them about the benefits associated with organizing Respondent's employees. In February 1997, Jehl visited the jobsite and had a conversation with Curd. Jehl asked Curd whether the Respondent needed help and Curd said, "he was in a real bind for help and was way behind."

On March 7, Jehl went to the jobsite. He told Curd, due to their last conversation in which Curd said he needed help, that he was making an unconditional offer to return to work. Curd began to laugh and said, "that Respondent would never [hire] him back for everything that had gone on at the job, and he was not allowed on the project." He also said, "around here you are considered a marked man, everyone on the job has a hunting license and shotguns." Jehl followed up his oral offer to return to work with a March 11 letter to this effect (GC Exh. 25). No response was ever received from the Respondent.

5. The hiring of covert union members Jack Neal Jr. and Anthony Bane

Local 661 Business Agent Jack Neal Jr., saw one of Respondent's newspaper advertisements in early January 1997. He went to Respondent's office, spoke with Karen Nottingham and picked up a job application. He took the job application back to the union hall and made a number of copies that he distributed to unemployed union members. Indeed, he personally observed a number of union members sign their job applications (GC Exh. 14–21). Shortly thereafter, Neal saw another of Respondent's ads in the Muncie newspaper and telephoned the facility. He spoke with Ken Masiongale who inquired whether he had a plumber license and encouraged him to get a job application. At no time, however, did Masiongale inform Neal about the requirement to obtain a background investigation. Neal went to the facility on January 26, and picked up another job application that he took with him.

On March 28, Neal personally delivered his employment application to Respondent's receptionist along with a number of job applications that had been completed by unemployed union members (GC Exh. 7–21 and R. Exh. 2). On April 15, Neal telephoned Respondent's office regarding his job application and spoke with Nottingham, who informed him that he would have to speak with Masiongale. Neal left his name and telephone number. On the evening of April 15, Superintendent Michael Woods left a message on Neal's answering machine. Neal telephoned Respondent's office the next day and was given Wood's cellular telephone number at the Bayshore jobsite. On April 17, Neal reached Woods at the jobsite and informed him he had a plumber license and prior experience working on apartment projects. Woods offered Neal $14 an hour and told him he would see him the following Monday at the Bayshore jobsite to commence work. Later that evening, Neal called Woods to let him know that he had a friend named Anthony Bane who also had a plumber license and was interested in working. Woods requested Neal to have Bane telephone him at the jobsite. Woods also requested Neal's drivers license number to do a background check and said he would see Neal on the jobsite next Monday unless he heard from him before that time. Nothing was mentioned about any other type of background check.

On April 17, Bane telephoned Woods and informed him he possessed a plumber's license and had prior residential and piping experience. Woods requested Bane's drivers license number and during the conversation it was agreed that Bane, like Neal, would be hired at $14 an hour. Woods told Bane to show up at the jobsite the following Monday unless he heard from him to the contrary. Neither Bane nor Neal made any reference to their union affiliation during the initial hiring discussions with Woods.

On April 21, Neal and Bane met for breakfast before proceeding to the Bayshore jobsite. Woods requested that both employees fill out job applications along with other paperwork (GC Exh. 23–24). During initial discussions while filling out the job applications, Woods informed Neal and Bane that he needed plumbers as the job was expected to last 18 months. Woods made a telephone call to the office and informed "Mike" that the two new plumbers were filling out their paperwork and then would be assigned to Foreman Mike Dalton to commence work. Although Bane included the fact that he attended the Union apprenticeship program on his application, Woods did not review the applications before instructing Neal and Bane to report to Dalton.

6. The events that occurred after Neal and Bane revealed their union affiliation

Before Neal and Bane left the trailer to report to Dalton, Bane informed Woods that they were union organizers. Bane testified that Wood's demeanor changed dramatically after he apprised him that they were union organizers. In fact, Woods slammed both hands down and starred out the door. He said, "I want you to sit in your truck until Mike Masiongale comes to the jobsite." Neal and Bane left the trailer but were able to see Woods make a telephone call. Shortly thereafter, Woods came out to the truck and told Neal and Bane that the Respondent had a standard hiring procedure that involved a private detective before people were hired. Bane said, you previously told me that everything was fine and if I did not hear from you by Friday, to report to work. Neal said, you did mention a driver's license check but never mentioned anything else. Woods replied, "Well, that is just part of it." As they were leaving the jobsite, Bane told Wood's that they were there to do a good job. Woods said, "no you didn't, you are here to screw up my operation."

Bane, upon returning home on April 21, retrieved a message from his answering machine and telephoned Nottingham at Respondent's facility. Nottingham told Bane that he needed to fill out a release for the private detective background check. It was agreed that the forms would be faxed to Bane who completed and signed the release and faxed it back to Nottingham. A meeting with the private detective was scheduled which Bane was forced to cancel because of a prior commitment. A second appointment was scheduled but Nottingham cancelled it and Bane never heard anything else regarding the background check or a date to resume work at Respondent.

Neal also received a message from Nottingham to sign a release for a background check. He went the next day to Respondent's office and signed the release. Shortly thereafter, Neal met with private detective Bing Crosby for approximately 30 minutes. Dur-

ing the meeting, Crosby asked Neal about his union background and affiliation. Neal did not hear anything for about 3 weeks so on May 21, he telephoned Respondent's office and spoke with Nottingham. Neal inquired about the status of his application and Nottingham said, "I thought you did not want a job." Neal replied that he wanted a job and Nottingham said that if you were still interested, Superintendent John Blevins would be contacting you. On May 22, Neal spoke with Blevins who requested that he come to the office on May 27. Neal reported to Respondent's facility on May 27, and wore an unionT-shirt. Blevins requested Neal to fill out additional paperwork and offered him $13 an hour. Neal apprised Blevins that Woods had previously hired him at $14 an hour. Neal was directed to watch a safety film and then was introduced to Masiongale who told him he did not like his union shirt. Blevins told Neal he would not be returning to the Bayshore jobsite but would be working out of the shop putting together shower faucet heads. Neal was directed to the storage garage and was told he would be working in this area. Blevins had one of his men come to the garage with a tow motor to clear out a space for Neal to work in. Since there was no workstation or benches in the garage, Neal obtained several sawhorses and some plywood to make a suitable workbench to perform his assignment. Neal was unable to locate any shower faucets and apprised Blevins of this fact. Blevins promised to order some but instructed Neal to cut copper pipe. Neal asked Blevins the proper dimensions for the copper pipe and Blevins promised to get back to him. After Blevins provided the required dimensions, Neal began to cut the copper pipe as instructed. Shortly thereafter, Masiongale and Blevins approached Neal in the garage. Masiongale told Neal, "that he did not want him talking about the union to his employees, handing out literature, and did not want him to talk to his employees about the union on the job, in his office or on his property." He also said, "that he did not want the Union, they messed with me before." After Masiongale left the garage, Neal told Blevins that Masiongale did not have the right to talk to him like that. Therefore, he was going on strike. He picked up his tools and left the facility. Neal returned to the facility the next day and as the door was open observed that the garage was again being used as a storage facility. Neal also observed that no one was working in the garage. Thereafter, Neal attempted to telephone Blevins and Woods but Respondent never returned any of his calls. Neal admitted, however, that no one at the Respondent told him he was fired, and he did not make an unconditional offer to return to work.

B. Analysis and Findings

1. The 8(a)(1) violations

The General Counsel alleges in paragraph 5(a) through (h) that Respondent engaged in independent violations of Section 8(a)(1) of the Act.

The general test applied to determine whether employer statements violate Section 8(a)(1) of the Act is "whether the employer engaged in conduct which reasonably tends to interfere with, restrain, or coerce employees in the free exercise of rights under the Act." *NLRB v. Almet, Inc.,* 987 F.2d 445 (7th Cir. 1993); *Reeves Bros.,* 320 NLRB 1082 (1996).

In paragraph 5(a), Curd is alleged to have interrogated employees at the Springlake Apartment project about their union membership, activities, and sympathies.

Gravit and Jehl credibly testified that on December 16, 1996, around 9:30 a.m., they observed two individuals with union insignia hand papers to Curd while they briefly conversed. A short time later, Curd approached Gravit and Jehl, and asked whether either of them knew the union men who were just here? Gravit said, "he knew one of the employees." Curd briefly walked away but then returned and said, "have either of you been a member of the union before?" Gravit said, "he worked permit a couple times in the past few years. "Jehl said, "he was never a member of Local 172." Curd also said, after Jehl announced that he was going on strike for better wages, "are you both union members and are you both going out on strike?"

The testimony of Gravit and Jehl is unrebutted as Curd did not testify at the hearing.

Based on the forgoing, I find that Curd's interrogation of Gravit and Jehl contravenes the principles of Section 7, and therefore is violative of Section 8(a)(1) of the Act.

In paragraph 5(b) of the complaint, Curd on March 8, is alleged to have threatened employees with violence at the Springlake Apartment project because they engaged in union activities.

Jehl credibly testified that after he and Gravit went on strike to protest their wages, he returned to the jobsite on March 7, and made an unconditional offer to return to work. Curd began to laugh and said, "that Respondent would never hire him back for everything that had gone on that job, and he was not allowed on the project." He also said, "around here you are considered a marked man, everyone on the job has a hunting license and shotguns."

Under these circumstances, and particularly noting that Jehl's testimony stands unrebutted, I find that Curd's statement is a threat made to deter Jehl's active expression of his union sympathies at the jobsite. Therefore, such statement is violative of Section 8(a)(1) of the Act.

In regard to paragraphs 5(c), (d), and (e) of the complaint, Woods is alleged to have engaged in surveillance of employees at the Bayshore jobsite, isolated certain employees because of their union activities, and changed Respondent's hiring policies by requiring applicants to be interviewed by a private investigator.

On April 21, before Neal and Bane left the trailer to report to Dalton, Bane informed Woods that they were union organizers. Bane testified that Wood's demeanor changed dramatically after this announcement. In fact, Woods slammed both hands down and stared out the door. He said, "I want you to sit in your truck until Mike Masiongale comes to the jobsite." Neal and Bane left the trailer but were able to see Woods make a telephone call. Shortly thereafter, Woods came out to the truck and told Neal and Bane that the Respondent had a standard hiring procedure that involved a private detective before people were hired. Bane said, you previously told me that everything was fine and if I did not hear from you by Friday, to report to work. Neal said, you did mention a driver's license check but never mentioned anything else. Woods replied, "Well, that is just part of it." As they were leaving the jobsite, Bane told Woods that they were there to do a good job. Woods said, "no you didn't, you came to screw up my operation."

The testimony of Neal and Bane is unrebutted as Woods did not testify during the course of the hearing. Accordingly, I find that Wood's directive to Neal and Bane to sit in the truck immediately after Bane apprised him of their union status, was solely to isolate Neal and Bane and prevent them from engaging in union activities. Likewise, I find Wood's actions to be a means to keep the employees whereabouts under surveillance and prevent them from talking to employees on the jobsite.

With respect to the change in the hiring policy by requiring applicants to be interviewed by a private investigator, I find that this procedure was solely implemented to discourage union applicants from applying for positions at the Respondent. In this regard, I reject Masiongale's testimony that the procedure was implemented

in November 1996, for the following reasons. First, Curd never mentioned the private investigator requirement when he hired Gravit and Jehl in December 1996. Second, Woods never mentioned the private investigator requirement on April 17 and 21, when he hired Neal and Bane prior to their announcement that they were union organizers. Third, employees Jack Winton and Randy Turner, who were hired during the summer of 1997 and were not union members, credibly testified that they were not required to fill out paperwork or sign a release for a background check nor did they have a prehire interview with a private investigator.

Accordingly, I find that about April 21, Respondent changed its hiring policies by requiring applicants to be interviewed by a private investigator solely for the purpose of discouraging union applicants. Therefore, Respondent violated Section 8(a)(1) of the Act.

In summary, I find that Respondent violated Section 8(a)(1) of the Act as alleged by the General Counsel in paragraphs 5(c), (d), and (e).

With respect to paragraphs 5(f), (g), and (h) of the complaint, the General Counsel alleges that Blevins isolated an employee because of his union activities and Masiongale informed an employee that he was prohibited from discussing the Union and distributing union literature.

Neal reported to Respondent's facility on May 27 and wore an union T-shirt. Blevins requested Neal to fill out additional paperwork and offered him $13 an hour. Neal apprised Blevins that Woods previously hired him at $14 an hour. Neal was directed to watch a safety film and then was introduced to Masiongale who told him he did not like his union T-shirt. Blevins told Neal he would not be returning to the Bayshore jobsite but would be working out of the shop putting together shower faucet heads. Neal was taken to the storage garage and was told he would be working in this area. Blevins had one of his men clear out a space for Neal to work in. Since there was no workstation in the garage, Neal obtained several sawhorses and some plywood to make a suitable workbench to perform his assignment. Neal was unable to locate any shower faucets and apprised Blevins of this fact. Blevins promised to order some but instructed Neal to cut copper pipe. Neal asked Blevins the proper dimensions for the copper pipe and Blevins promised to get back to him. After Blevins provided the required dimensions, Neal began to cut the copper pipe as instructed. Shortly thereafter, Masiongale and Blevins approached Neal in the garage. Masiongale told Neal, "that he did not want him talking about the union to his employees, handing out literature, and did not want him to talk to his employees about the union on the job, in his office or on his property." He also said, "that he did not want the Union, they messed with me before." After Masiongale left the garage, Neal told Blevins that Masiongale did not have the right to talk to him like that. Therefore, he was going on strike. He picked up his tools and left the facility. Neal returned to the facility the next day and as the door was open observed that the garage was again being used as a storage facility. Neal also observed that no one was working in the garage.

The testimony of Neal regarding these matters is unrebutted as Blevins did not testify during the course of the hearing and although Masiongale testified, he did not deny that he made the statements attributed to him by Neal.

In regard to isolating Neal in the garage, Masiongale grudgingly admitted that while shower faucet heads were previously made at the shop, they were never made in the storage garage. Likewise, employee Eric Alva who worked at Respondent from 1995 to June 1998, credibly testified that the garage was primarily used for storage and during his employment he never saw the garage setup for fabrication, or work benches, or tools utilized in that area.

Under these circumstances, I conclude that the Respondent assigned Neal to the garage rather then returning him to the Bayshore jobsite solely to isolate and prevent him from engaging in union activities. Accordingly, Respondent by this action violated Section 8(a)(1) of the Act.

Likewise, I credit the unrebutted testimony of Neal that Masiongale told him he was prohibited from discussing the Union on the job, in the office or on his property, and distributing union literature in those areas. Masiongale made no reference to the fact that Neal was privileged to engage in these activities before or after work or during breaks. Under these circumstances, I find that Respondent's instructions to this effect are violative of the Act and contravene Section 8(a)(1).

In conclusion, I find as alleged by the General Counsel in paragraphs 5(a) through (h) of the complaint, the Respondent violated Section 8(a)(1) of the Act.

2. The refusal to hire the employees listed in paragraphs 6(a), (f), and (j) of the complaint[5]

In *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board established an analytical framework for deciding discrimination cases turning on employer motivation. The General Counsel must persuasively establish that the evidence supports an inference that protected conduct was a motivating factor in the employer's decision.[6] In a refusal to hire case, the General Counsel specifically must establish that each alleged discriminatee submitted an employment application, was refused employment, was a union member or supporter, was known or suspected to be a union supporter by the employer, who harbored antiunion animus, and who refused to hire the alleged discriminatee because of that animus. *Big E's Foodland,* 242 NLRB 963, 968 (1979). Inference of animus may be inferred from the total circumstances proved and in some circumstances may be inferred in the absence of direct evidence. *Fluor Daniel, Inc.,* 304 NLRB 970 (1991). Once that is accomplished, the burden shifts to the employer to persuasively establish by a preponderance of the evidence that it would have made the same decision even in the absence of protected activity. *T&J Trucking Co.,* 316 NLRB 771 (1995).

3. Respondent's knowledge of the applicants' union membership and its related union animus

The Respondent does not deny that it received the employment applications listed in paragraphs 6(a), (f), and (j), with the exception of Rogers and Paluzzi's applications. Likewise, there is no challenge to the fact that all were union members, and that none were hired. In regard to the Rogers and Paluzzi's applications, both employees credibly testified that they went to the Springlake Apartment project on December 16, 1996, and personally submitted their application to the superintendent in charge. Each employee wrote "Voluntary Union Organizer" on the top of the application and described the physical characteristics of the superintendent they spoke with which corresponds with other witnesses description of Ron Curd. Moreover, Gravit credibly testified that he

[5] The employees are William Rogers, Christine Brittan, Geoff Paluzzi, Rodney Boyle, Mark Darnell, Charles Atkinson, Jeryl Cooke, Edward Meinzen, Merlin Rice, Charles Gates, Joseph Beatson, James Poulson, Roger Hodson, Bruce Morehouse, Duane Harty, Michael Bowen, Denny Smith, William Fortwengler, James Salmon, and Stacey Stockton.

[6] *Manno Electric,* 321 NLRB 278 fn. 12 (1996).

saw Paluzzi on that date in the late afternoon talking to Curd, and both Gravit and Jehl testified that they observed two individuals with union insignia talk to Curd on that date and hand him papers. Curd did not testify during the course of the hearing. Accordingly, I credit the unrebutted testimony of Rogers and Paluzzi that they submitted their job applications to Curd. Likewise, this was about the same time that Christine Britton submitted her application to Superintendent Curd, which the Respondent acknowledges receiving. Based on the credible evidence presented, I conclude that Rogers and Paluzzi filed applications with Curd and hold the Respondent accountable for their receipt.

The evidence establishes that the entries on all of the respective application forms sufficiently notified the Respondent that the applicants belonged to the Union. In this regard, all of the employees listed former union employers and each wrote across the top of the application the phrase "Voluntary Union Organizer." In addition, a number of the employees wore union insignia when making their applications, which served to alert the Respondent that they were union members. Importantly, with respect to the applicants that filed applications at Respondent's facility on August 22, Masiongale testified that he knew the applicants previously worked for union employers as he recognized the contractors listed in the applications.

Credible evidence also exists of antiunion animus. As previously found, Respondent representatives Curd, Woods, Blevins, and Masiongale engaged in numerous acts of independent Section 8(a)(1) conduct during the period between December 16, 1996, and May 27. Likewise, Respondent rejected all of the overt applications that were submitted and did not grant interviews to these individuals. On the other hand, Respondent considered the covert applications of employees Gravit, Jehl, Neal, and Bane, granted interviews to each, and hired them without extensive background checks. It is also noted that Gravitt and Jehl were hired even though they did not possess plumbing licenses unlike Britton, Paluzzi, and Rogers who were much more experienced and possessed valid plumbing licenses.

Accordingly, I find that the General Counsel has satisfied its initial burden of persuasively establishing that the alleged discriminatees were not hired because of their union membership. The Respondent must now establish that its hiring decisions would have been the same in the absence of union membership.

4. The Respondent's defenses

The Respondent asserts that its hiring decisions were based on lawful criteria including, among other things, skill, experience, employment history, appearance, and earning history. Applying these criteria, the Respondent contends that it hired the best people available. In this regard, Masiongale acknowledges that he received and reviewed the applications brought to the office on March 28 (GC Exh. 7–21), but rejected all of them because they were not considered current. Since the applications were all signed and dated in January 1997, and the body of the application states that they would be current for only 30 days, all the applications were placed in the noncurrent file and were not considered.

Concerning the job applications that were filed in the office on August 22 (GC Exh. 3–6), Masiongale testified that they were not considered because the earning history was in the range of $20 an hour and he only considered applicants in the $13–$15 an hour range.

Respondent introduced in evidence 54 job applications for individuals that were hired from January 1, 1995, to August 1998 (R. Exh. 5(a)–5(bbb)). During the course of the hearing, however, it made no arguments as to why these individuals were hired or why the qualifications of these employees warranted greater consideration then the overt union applicants. In its posthearing brief, Respondent argues that the job applications corroborate its hiring preference for people who had been earning in the $13–$15 per hour range.

The Respondent's arguments are unpersuasive for several reasons. First, I previously found that Respondent engaged in numerous independent violations of the Act and note that Masiongale told Neal that he did not want the Union. Thus, it is apparent that the Respondent was dead set against hiring any individual who it knew openly supported the Union. Thus, I reject Masiongale's testimony that the March 28 applications were not considered because they were stale. I find this to be a belated defense and note that it was never mentioned to the employees when they filed their applications on that date or at anytime thereafter. Second, the Respondent did not present any evidence as to why the applicants it hired were better qualified then the overt union applicants. Third, it is apparent that the Respondent needed qualified plumbers to man its jobsites based on statements to this effect by Curd and Woods and the fact that it hired covert union applicants Gravit, Jehl, Neal, and Bane. Fourth, contrary to his direct examination, Masiongale admitted on cross examination that even though the August 22 job applications did not mention the wages earned by the applicants, he did not hire them because the employer's listed were union contractors and he knew that their wages exceeded $13 an hour. Lastly, I find that Britton's application was filed with Curd on December 16, 1996, rather then March 28, and she was not hired by Respondent solely because of her open expression of union affiliation.

Accordingly, I find that the Respondent's reasons for not hiring any of the overt union applicants are pretextual. Had it not been for their union affiliation, the individuals would have been considered for hire. I, therefore, find that the Respondent violated Section 8(a)(1) and (3) of the Act by refusing to hire or consider for hire the overt union applicants.

5. The December 17, 1996 strike, the unconditional offer of reinstatement, and the discharge of Jeffrey Jehl

The General Counsel alleges these allegations in paragraphs 6(b) through (e) of the complaint.

On December 17, 1996, Gravit and Jehl arrived for there second day of work around 6:40 a.m., and immediately began distributing union literature and meeting with employees about the Union. Jehl wore a white union organizer jacket while Gravit wore a Local 172 baseball cap. Curd arrived about 10 minutes later, and Jehl apprised him that he was a union organizer. Curd replied, "that he figured yesterday that they were union members since he only gave an application to Gravit that was allowed off site and the two union guys had job applications." He also said, "If Masiongale had to pay union wages they might as well pull off the job, they would go broke and might as well close up."

Gravit and Jehl proceeded to their work area and began backfilling some underground for the installation of pipe. While they were working, Gravit told Jehl that Respondent was in violation of the plumbing code because the pipe was being improperly installed. Jehl did not inform Curd or anyone else at Respondent about the perceived code violations. Rather, he sent a letter to the plumbing inspector about the problem. Around 8 a.m., Gravit and Jehl went to see Curd and told him that they were underpaid because other plumbers on the jobsite were being paid hourly wages in excess of their wage rate. Curd informed both employees that he only had the

authority to set starting wages, but could not grant wage increases, and when he was ready he would contact the office to see if they could be paid at a higher rate. Jehl said, "well, until then I am going on strike for better wages." Curd said, "are you both union members?" They said, "yes." He then said, "are you both going out on strike?" Gravit replied, "yes." Both Gravit and Jehl left the jobsite and did not return to work.

On March 7, Jehl went to the jobsite and made an unconditional offer to return to work. Curd began to laugh and said, "that Respondent would never higher him back for everything that had gone on at the job, and he was not allowed on the project." He also said, "around here you are considered a marked man; everyone on the job has a hunting license and shotguns." Jehl followed up his oral offer to return to work with a March 11 letter to this effect (GC Exh. 25). No response was ever received from the Respondent.

The Board has held that "there can be no doubt that there is no more vital term and condition of employment than one's wages, and employee complaints in this regard clearly constitute protected activity." *Cal-Walts, Inc.,* 258 NLRB 974, 979 (1981). In the subject case, Gravit and Jehl expressed complaints about the amount of hourly wages paid in comparison to other employees. Thus, Gravit and Jehl's protest concerning this issue was clearly protected activity under the Act.

With respect to the concerted nature of the activity, the Board has held that "individual action is concerted where the evidence supports a finding that the concerns expressed by the individual are [sic] logical outgrowth of the concerns expressed by the group." See *Mike Yurosek & Son,* 306 NLRB 1037, 1038 (1992). In this case, Gravit and Jehl jointly protested the amount of their hourly wages in comparison to the wages of other employees on the jobsite. Thus, I find that Gravit and Jehl's protest over hourly wages was protected concerted activity. See *Meyers Industries,* 268 NLRB 493, 497 (1984).

Based on the forgoing, I conclude that when Gravit and Jehl went on strike, it was a lawful economic strike flowing from their engaging in protected concerted activity.

On March 7, Jehl returned to the jobsite and orally made an unconditional offer of reinstatement to Curd. The evidence reveals that Curd rejected the offer and apprised Jehl that he would never hire him back and he was not allowed on the project. Masiongale testified that Jehl was not hired back because he complained to the plumbing inspector and never told anyone in authority at Respondent about the code violations on the Springlake jobsite.

Based on the foregoing, and particularly noting the *Wright Line* analysis, I find that the Respondent refused to reinstate Jehl to his former position of employment and effectively discharged him on March 7, because of his protected concerted activity and/or his union activities. Contrary to Masiongale's reasons that were articulated for the first time at trial, I conclude that the Respondent would not have taken this action but for Jehl's active participation in protected concerted or union activities. Therefore, I find that the Respondent violated Section 8(a)(1) and (3) of the Act.

6. The discharge and restriction of the work activities and work areas of Jack Neal Jr., the discharge of Anthony Bane, and the May 27 strike

The General Counsel alleges these allegations in paragraphs 6(g), (h), (i), and 7(a) and (b) of the complaint.

On March 28, Neal personally delivered his employment application to Respondent's receptionist along with a number of job applications that had been completed by unemployed Union members. On April 15, Neal telephoned Respondent's office regarding his job application and spoke with Nottingham, who informed him that he would have to speak with Masiongale. Neal left his name and telephone number. On the evening of April 15, Superintendent Woods left a message on Neal's answering machine. Neal telephoned Respondent's office the next day and was given Wood's cellular telephone number at the Bayshore jobsite in Greenwood, Indiana. On April 17, Neal reached Woods at the jobsite and informed him he had a plumber's license and prior experience working on apartment projects. Woods offered Neal $14 an hour and told him he would see him the following Monday at the Bayshore jobsite to commence work. Later that evening, Neal called Woods and told him he had a friend named Anthony Bane who also had a plumber's license and was interested in working. Woods requested Neal to have Bane telephone him at the jobsite. Woods also requested Neal's drivers license number to do a background check and said he would see him on the jobsite next Monday unless he heard from him before that time.

On April 17, Bane telephoned Woods at the jobsite and informed him he possessed a plumber license and had prior residential and piping experience. Woods requested Bane's drivers license number and during the conversation it was agreed that Bane, like Neal, would be hired at $14 an hour. Woods instructed Bane to show up at the jobsite the following Monday unless he heard from him to the contrary.

On April 21, Neal and Bane met for breakfast before proceeding to the Bayshore jobsite. Woods requested that both employees fill out applications along with other paperwork (GC Exh. 23–24). During initial discussions while filling out the job applications, Woods informed Neal and Bane that he needed plumbers as the job was expected to last 18 months. Woods made a telephone call to the office and informed "Mike" that the two new plumbers were filling out their paperwork and then would be assigned to Foreman Mike Dalton to commence work. Before Neal and Bane left the trailer to report to Dalton, Bane informed Woods that they were union organizers. Bane testified that Wood's demeanor changed dramatically after he apprised him that they were union organizers. In fact, Woods slammed both hands down and starred out the door. He said, "I want you to sit in your truck until Mike Masiongale comes to the jobsite." Neal and Bane left the trailer but were able to see Woods make a telephone call. Shortly thereafter, Woods came out to the truck and told Neal and Bane that the Respondent had a standard hiring procedure that involved a private detective before people were hired. Bane said, you previously told me that everything was fine and if I did not hear from you by Friday, to report to work. Neal said, you did mention a driver's license check but never mentioned anything else. Woods replied, "Well, that is just part of it." Bane told Woods that they were prepared to do a good job but Woods asked them to leave the jobsite.

Bane retrieved a message from his answering machine on April 21, and telephoned Nottingham at Respondent's facility. Nottingham told Bane that he needed to fill out a release for the background check. It was agreed that the forms would be faxed to Bane who completed and signed the release and faxed it back to Nottingham. A meeting with the private detective was scheduled which Bane was forced to cancel because of a prior commitment. A second appointment was scheduled but Nottingham cancelled it and Bane never heard anything else regarding the background check or a date to resume work at Respondent.

Neal also received a message from Nottingham to sign a release for a background check. He went the next day to Respondent's office and signed the release. Shortly thereafter, Neal met with private detective Bing Crosby for approximately 30 minutes. Dur-

ing the meeting, Crosby asked Neal about his union background and affiliation. Neal did not hear anything for about 3 weeks so on May 21, he telephoned Respondent's office and spoke with Nottingham. Neal inquired about the status of his application and Nottingham said, "I thought you did not want a job." Neal said, that he wanted to work, and Nottingham said that if you were still interested, Superintendent John Blevins would be contacting you. On May 22, Neal spoke with Blevins who requested that he come to the office on May 27. Neal reported to Respondent's facility on May 27 and wore an unionT-shirt. Blevins requested Neal to fill out additional paperwork and offered him $13 an hour. Neal apprised Blevins that Woods had previously hired him at $14 an hour. Neal was directed to watch a safety film and then was introduced to Masiongale who told him he did not like his union shirt. Blevins told Neal he would not be returning to the Bayshore jobsite but would be working out of the shop putting together shower faucet heads. Neal was directed to the storage garage and was told he would be working in this area. Blevins instructed one of his employees to use the tow motor to clear out a space for Neal to work in. Neal obtained several sawhorses and some plywood to make a suitable workbench to perform his assignment. Neal was unable to locate any shower faucets and apprised Blevins of this fact. Blevins promised to order some but instructed Neal to cut copper pipe. Neal asked Blevins the proper dimensions for the copper pipe and Blevins promised to get back to him. After Blevins provided the required dimensions, Neal began to cut the copper pipe as instructed. Shortly thereafter, Masiongale and Blevins approached Neal in the garage. Masiongale told Neal that he did not want him to talk to the employees in the shop or at the jobsite about the Union or hand out union literature in those areas. He also said, "that he did not want the Union, they messed with me before." After Masiongale left the garage, Neal told Blevins that Masiongale did not have the right to talk to him like that. Therefore, he was going on strike. He picked up his tools and left the facility. Neal returned to the facility the next day and as the door was open observed that the garage was again being used as a storage facility. Neal also observed that no one was working in the garage. Thereafter, Neal attempted to telephone Blevins and Woods but Respondent never returned any of his calls. Neal admitted, however, that no one at the Respondent told him he was fired, and he did not make an unconditional offer to return to work.

Based on the forgoing, I do not find that either Neal or Bane was discharged on April 21. Rather, both employees were requested to complete release forms to continue the employment process and were still technically employees of Respondent on that date. Accordingly, I recommend that paragraph 6 (g) of the complaint be dismissed.

On the other hand, I find that when Respondent cancelled the second appointment for Bane to see the private detective, it in essence terminated his employment. I conclude that Bane was discharged solely because of his union affiliation. Indeed, before Bane revealed his affiliation with the Union, Woods hired him as a journeyman plumber. Moreover, the Respondent did not produce any evidence to establish the reason it never communicated with Bane after canceling the second appointment. Thus, I find under *Wright Line,* that Bane was effectively discharged for engaging in union activities and the Respondent would not have taken the same action if Bane had not engaged in such activities.

With respect to Neal, and particularly noting the credible testimony of employee Eric Alva that the garage was primarily used for storage and never was used for fabrication or as a work area, I find that Respondent isolated Neal and restricted his work activities. These actions were undertaken solely to prevent Neal from communicating with other employees and from engaging in union activities. Thus, I conclude that paragraph 6 (h) of the complaint should be sustained and Respondent violated Section 8(a)(1) and (3) of the Act by its actions.

In regard to the May 27 strike, the Board has held that a strike which is motivated or prolonged, even in part, by an employer's unfair labor practices is an unfair labor practice strike. *C-Line Express,* 292 NLRB 638 (1989); *Tall Pines Inn,* 268 NLRB 1392, 1411 (1984). I find that Masiongale's statement to Neal in the garage, that he did not want him talking to employees about the Union or distributing literature to employees on the jobsite, to be the catalyst that motivated Neal to engage in the strike. As an unfair labor practice striker, an employee is entitled to immediate reinstatement on an unconditional application. See *Laidlaw Corp.,* 171 NLRB 1366, 1368, (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert denied 397 U.S. 920 (1970). This is so even if so-called permanent replacements have been hired to fill their jobs and must be terminated to make room for them. Here, however, Neal never made an unconditional offer of reinstatement. Until this occurs, Respondent is under no obligation to reinstate him. Likewise, I do not find, as alleged by the General Counsel, that Respondent caused the termination of Neal on May 27. Rather, Neal independently decided to engage in a strike over unfair labor practices committed by Respondent. Moreover, I find that since Neal went on strike rather then quitting over being assigned the shower fabrication work, Respondent's actions cannot be the basis for a constructive discharge claim. *Aero Industries,* 314 NLRB 741 (1994).

In summary, I find that the General Counsel sustained the allegations in paragraph 6(g) regarding Bane after April 21, and to paragraphs 6(h), 7(a) and (b) of the complaint, but did not sustain the allegations of the complaint in paragraphs 6(g) and (i) relating to Neal.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 172 and Local 661 are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by interrogating employees about their union activities and sympathies, threatening employees with violence, engaging in surveillance of employees union activities, isolating certain of its employees because they engaged in union activities, requiring applicants to be interviewed by a private investigator, and informing its employees that they were prohibited from discussing the union and distributing union literature.

4. By refusing to employ or consider for hire William Rogers, Christine Britton, Geoff Paluzzi, Rodney Boyle, Mark Darnell, Charles Atkinson, Jeryl Cooke, Edward Meinzen, Merlin Rice, Charles Gates, Joseph Beatson, James Poulson, Roger Hodson, Bruce Morehouse, Duane Harty, Michael Bowen, Denny Smith, William Fortwengler, James Salmon, and Stacey Stockton because they were union members, the Respondent violated Section 8(a)(1) and (3) of the Act.

5. Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act by restricting the work activities and work area of Jack Neal Jr., and by discharging employees Jeffrey Jehl and Anthony Bane.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

7. The Respondent did not otherwise engage in any other unfair labor practice alleged in the complaint in violation of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully refused to employ or consider for hire the above noted employees in paragraph 4 of the conclusions of law, I shall order the Respondent to offer them employment and make them whole for any losses of earnings and benefits they may have suffered as a result of the Respondent's unlawful conduct. Likewise, the Respondent having discriminatorily discharged Jeffrey Jehl and Anthony Bane, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

I will leave to the compliance phase of this proceeding the determination of the extent to which the Respondent would have employed the employees listed in paragraph 4 of the conclusions of law, if it had used nondiscriminatory criteria. *Ultrasystems Western Contractors,* 316 NLRB 1243 (1995); *H.B. Zachry Co.,* 319 NLRB 967 (1995) (determinations of effect of employers' refusal to consider applicants for hire left to compliance). If at the compliance phase it is determined that the Respondent would have employed the listed employees for subsequent projects, the inquiry as to the amount of backpay due these individuals will include any amounts they would have received on other jobs to which the Respondent would have assigned them. If at the compliance stage it is established that the Respondent would have assigned the listed employees to projects currently in progress, I shall order the Respondent to offer them immediate employment and place them in positions for which they are qualified.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The Respondent, Masiongale Electrical-Mechanical Inc., Muncie, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees concerning their union membership, sympathy, and activity.

(b) Threatening its employees with violence because they engaged in union activity.

(c) Engaging in surveillance of employees engaged in union activities.

(d) Isolating certain of its employees because they engaged in union activities.

(e) Changing its hiring policies by requiring applicants to be interviewed by a private investigator for the purpose of discouraging union applicants.

(f) Informing its employees that they were prohibited from discussing the Union or distributing union literature.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Jeffrey Jehl and Anthony Bane full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) On an unconditional offer to return to work by Jack Neal Jr., reinstate him to his former position of employment, displacing, if necessary, any replacement hired since May 27, 1997.

(c) Make Jeffrey Jehl and Anthony Bane whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(d) Within 14 days from the date of this Order, offer immediate employment to the applicants listed in the remedy section of the decision at rates paid employees hired by the Respondent with commensurate experience, if necessary terminating the service of employees hired in their stead.

(e) Make whole the applicants listed in the remedy section of the decision for wage and benefit losses they may have suffered by virtue of the discrimination practiced against them in the manner prescribed in the remedy section of this decision

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(g) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its facility in Muncie, Indiana, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 16, 1996.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."